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IN THE

Supreme Court of the United States

October Term, 1965

No. 1966 119

JOHN MARSHALL,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, John Marshall, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming a judgment of the United States District Court for the Southern District of California adjudging petitioner guilty of violation of 18 USC 1952 (Interstate or foreign travel or transportation in aid of racketeering enterprises) and of 18 USC 371 (Conspiracy), and sentencing petitioner to 10 years' imprisonment.

Opinions Below.

No opinion was written by the trial court; the trial was by jury.

The opinion of the court below [CT 345-364][1] is reported at 355 F. 2d 999. It is set out hereinafter as Appendix "A".

[1]The record certified to this Court by the clerk of the court below, per his March 23, 1966 letter of transmittal, consists of

The judgment of the court below [CT 365] is set out as Appendix "B".

Grounds on Which the Jurisdiction of This Court Is Invoked.

1. The date of the judgment sought to be reviewed is January 27, 1966 [CT 365], and the time of its entry is the same. (*Ibid.*)

2. Timely filed petition for rehearing was denied on March 10, 1966 [CT 366]. On April 1, 1966, Mr. Justice Douglas granted an extension of time within which to petition for certiorari to and including May 7, 1966.

3. The statutory provisions believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari are 28 USC 1254(1), Rule 22(2) of this Court and Rule 37(c), Federal Rules of Criminal Procedure.

Questions Presented for Review.

1. Is 18 USC 1952 constitutional under the Fifth Amendment to, and under Article I, §§ 8 and 10 of, the United States Constitution?

2. If the Section is constitutional, does it require, in order that there be a violation thereof, a continu-

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the Clerk's Transcript in both the trial court and in the Court of Appeals, herein designated as CT; one volume of the Master Index and Reporter's Transcript of the proceedings on the Impanelment of the Jury, herein designated as RTIJ; eighteen volumes of the Reporter's Transcript of the Trial Proceedings, herein designated as RT; and one volume of the Reporter's Transcript of the Proceedings on the Motion for New Trial and in arrest of Judgment, herein designated as RTMNT. The record also includes Plaintiff's Exhibits 1 through 146 and Defendants' Exhibits MM-1 through MM-20 (Master Index, pp. ix-xi), the latter being exhibits in connection with defendants' motion for mistrial based upon prejudicial newspaper and television publicity which occurred during the trial.

ous course of conduct, or may the Statute be violated by a single isolated act?

3. Is an indictment couched in the language of 18 USC 1952 a valid indictment in the light of *Russell v. United States*, 369 U.S. 749?

4. In order to charge an offense under 18 USC 1952 is it not necessary that the indictment allege the particular statute or statutes, and the jurisdiction whose laws, the travel with intent and the "thereafter" act was in violation of?

5. When the statute under which a defendant is tried sets forth a number of offenses, or different ways by which the statute can be violated, and the indictment charges in the language of the statute, is not the defendant entitled to an instruction that the jury must be unanimous as to which offense or offenses they might find had been committed, or as to which particular act or acts they might find had been committed by the defendant?

6. Is a defendant denied due process of law and a fair trial where during the trial there is widespread newspaper publicity and radio and television coverage accusing the defendant of having bombed a government witness in another case in which the defendant is likewise to be tried, of being a member of the Mafia and Cosa Nostra, of the "syndicate" and of the "underworld" and of being an ex-felon, some of which matters came to the attention of the jury and were discussed by it in the jury room?

7. May a conviction be permitted to stand in the light of the fair trial requirement and of this Court's power of supervision over criminal justice in the fed-

eral courts where the following matters occurred during the trial?

a. On the *voire dire* examination, the jury panel was asked whether any member thereof was or had been "employed as a law enforcement or a peace officer or police officer." A member thereof, who subsequently became the foreman of the jury, was silent. It was discovered after the trial that this juror was, at the very time the question was asked, in the possession of a special police officer's badge of the City of Glendale Police Department which had been given him in connection with his employment as a sports director of the Recreation Department of the City and which he had used in such capacity. Was the petitioner denied the effective right (see *Swain v. Alabama,* 380 U.S. 202) of peremptory challenge?

b. The prosecution put on as its own witness, an alleged co-conspirator, though unindicted, whose testimony it believed to be false and then argued to the jury that such testimony *was* false. Was this conduct by the prosecution in violation of the rationale of *Alcorta v. Texas,* 355 U.S. 28; *Napue v. Illinois,* 360 U.S. 264; *Brady v. Maryland,* 373 U.S. 83; *Mooney v. Holohan,* 294 U.S. 103?

c. Although none of the crimes charged was extortion, the alleged intended victim was allowed, over objection, to tell the jury of his subjective feelings of fear. Did the prejudicial nature of the evidence outweigh its possible probative value under the principle of *Eichel v. New York Central R. Co.,* 375 U.S. 253, 255?

d. Petitioner did not take the stand. During the argument to the jury, the prosecutor said to it: "There

is no one else (other than the alleged victim) that even testified on the subject" (of the alleged conversations between the defendants and the alleged victim), there being no one else present at said alleged conversations and so, no one else who could testify on the subject. Did this violate petitioner's Fifth Amendment right not to be a witness against himself, contrary to *Desmond v. United States,* 345 F. 2d 225, 227 (CA 1 1965), and *Stewart v. United States,* 366 U.S. 1?

e. At the conclusion of the evidence, the petitioner made a motion for judgment of acquittal as to all three counts including Count II, a substantive count, which, as charged, included acts to be considered by the jury as overt acts on the conspiracy count. The motion as to Count II was taken under advisement and the charge was permitted to go to the jury after whose verdict of guilty was returned, the motion was granted. Did this procedure permit the jury to consider as overt acts in furtherance of the conspiracy, acts which took place before the conspiracy could have been formed, contrary to the principle of *Dahly v. United States,* 50 F. 2d 37, 42 (CCA 8 1931), *Hall v. United States,* 109 F. 2d 976, 984 (CCA 10 1940), and *Goukler v. United States,* 294 Fed. 274, 275 (CCA 3 1923)?

f. The prosecution's case rested on the testimony of one witness, the alleged victim. The trial court refused to instruct the jury that where the Government's case may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny. Did this refusal violate the duty of the court as laid down in *Gordon v. United States,* 344 U.S. 414, 417?

Constitutional Provisions and Statutes Involved.

These are set out hereinafter as Appendix "C".

Statement of the Case.

Basis for Federal Jurisdiction in the Court of First Instance

The trial court had jurisdiction under 18 USC 3231.

Facts.

Viewing the facts most favorably from the prosecution's point of view and trying to separate out the evidence as to Smiley, an indicted, alleged co-conspirator as to whom all charges were dismissed at the conclusion of the prosecution's case, the facts appear to briefly be these:

On or about April 15 to 16, 1963, Marshall and Del Monico[2] drove from Las Vegas, Nevada, to Palm Springs, California [RT 451, 623, 538; Ex. 9]. They were vacationing [RT 617, 619]. Marshall played golf [RT 616, 619].

On April 28, 1963, the two made reservations to return to Las Vegas on May 1, 1963 [RT 693], where they intended to watch the Tournament of Champions [RT 624], a golf classic.

On April 30, 1963, Marshall talked on the telephone with one Ray Ryan, who owns a hotel in Palm Springs [RT 913, 915] and asked to see him [RT 915]. Ryan told Marshall to meet him, Ryan, at the barber shop [*Ibid.*]. Marshall did meet Ryan at the barber shop [RT 918] and Marshall and Del Monico drove Ryan to the airport [RT 923].

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[2]Defendant Del Monico is filing a separate petition for writ of certiorari.

During the ride to the airport, Ryan testified, Marshall said that he, Ryan, owed Nick Danolas some money and that he thought Ryan had clipped Dandolas out of it [RT 919]. Ryan also testified that just as they were passing the police station, Del Monico, who was driving [RT 919], reached over with his arm and hit Ryan across the chest [RT 923] (Ryan does not claim that he was harmed or injured in any way [*Idid.*]) with the remark that this was to show that they meant business [RT 923]. Ryan denied that he owed Dandolas any money [RT 920] and suggested to Marshall and Del Monico that they get Dandolas to meet Ryan in Las Vegas and face him with his claim [RT 998]. Marshall and Del Monico left Ryan at the airport and Ryan went to Las Vegas [RT 924].

Later that evening, Marshall and Del Monico had dinner with Smiley and Mrs. Crosby, and the four of them decided to fly to Las Vegas instead of just Marshall and Del Monico driving, as had been the previous plan [RT 768]. The four chartered an airplane in which they rode to Las Vegas, arriving in the early morning hours of May 1, 1963 [RT 771].

On May 1, 1963, at about noon time, Marshall met Ryan in the latter's room at the Desert Inn Hotel in Las Vegas [RT 930]. Ryan testified that during the conversation there, Marshall demanded money from him, told him that the "syndicate" had protected him in the past [RT 932]. Marshall then suggested that they leave that room and go somewhere else to talk because he did not trust Ryan's room [RT 932]. The two of them left the room together [RT 933], but instead of going somewhere else to talk, Ryan ran down the hall, where he saw Del Monico and Dandolas [RT 933-934];

into the lobby of the hotel, from which he later phoned the FBI [RT 935].

This prosecution then ensued.

During the trial, the newspapers, radio and television carried prejudicial stories [Exh. MM-1, MM-20] read, heard and seen by a number of the members of the jury [RT 2007, 2018, 2021, 2024, 2025, 2026, 2030, 2035, 2040, 2043, 2044, 2048, 2049, 2050, 2060, 2061] concerning the reputation of defendant Marshall, attributing to him the commission of a crime which had just been perpetrated in Chicago, stating that he was under indictment in another case and that he was an ex-felon. The trial court denied [RT 2069, 2221] timely filed motions for mistrial.

The trial court refused [RT 2687] to define for the jury the various elements of the crimes set forth in 18 USC 1952 and charged in the indictment, and refused [RT 2697, 2700] to instruct the jury that it must be unanimous as to what act or acts the petitioner performed and as to with what intent he travelled in interstate commerce.

Reasons for Granting the Writ and Argument Amplifying Same.

1. This case presents another instance of prejudicial newspaper and television publicity coming to the attention of the jury—publicity which was of such nature, that a conviction returned by a jury subjected to it raises serious questions of due process of law. This Court has on a number of occasions shown its interest in the matter of the problem presented by the exercise of the right of a free press and its relationship to a fair

trial;[3] the latest being *Sheppard v. Maxwell,* No. 490, Oct. Term, 1965, pending on writ of certiorari. In *Sheppard,* this Court has an opportunity to lay down guiding standards for the lower courts and for future cases. But petitioner is before this Court now and should have his case decided in the light of any guidelines that may be set.

Even under the existing cases, the publicity which admittedly did get to the jury [RT 2010, 2018-2021, 2025-2026, 2030-2031, 2034-2035, 2040, 2043-2044, 2048-2049; 2061]—albiet the members thereof avowed that they would not be affected by it [RT 2020, 2027, 2032, 2036, 2040, 2044, 2061]—was of such nature as to deprive petitioner of a fair trial. This Court should grant a hearing because the question is an ever recurring one.

The instant case differs from *Sheppard* in that it is not a case of publicity before or during the trial concerning the facts of the case and the guilt or innocence of the defendant. Rather, is this case like *Marshall v. United States, supra,* 360 U.S. 310, concerning material, clearly inadmissible at the trial—such as accusing the defendant of having committed a different and unrelated crime, statements as to his alleged bad reputation, a statement to the effect that he was convicted of a felony. The court below felt that defendant's right to a fair trial had not been denied. In so doing, it misapplied the facts of this case which are

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[3] *Marshall v. United States,* 360 U.S. 310; *Janko v. United States* 366 U.S. 716; *Irvin v. Dowd,* 366 U.S. 717; *Rideau v. Louisiana,* 373 U.S. 723; *Estes v. Texas,* 381 U.S. 532; *Stroble v. California,* 343 U.S. 181; *Shepherd v. Florida,* 341 U.S. 50, concurring opinion.

to the contrary and, in effect, declined to follow *Marshall.*

Petitioner's count as to the number of jurors who read the story in the newspaper, saw and heard it on television or heard it discussed, differs from the Court below which said [CT 353, Appx. A, p. 11] that six saw or heard nothing. Petitioner submits that at least nine of the then twelve sitting jurors and one alternate, admitted that they so read or heard.[4] But whether nine or eight or seven were so exposed is immaterial. In *Marshall,* the number was seven.

The Court below minimizes the nature of the newspaper and television coverage by reducing it to a description that petitioner "had something of a bad reputation in Chicago, and had been charged with complicity in some crime and would ultimately stand trial there." [CT 353]. But the facts are that in glaring front page headlines complete with a gruesome picture [*e.g.* Ex. MM-2], the jury was advised: "GANGLAND REVENGE — INFORMER BOMBED," and in the story, that "(a)n insurance agent turned informer against Chicago crime syndicate[5] hoodlum was blown from his car," that among those indicted for the crime as to which the bombing victim, Barbe, had turned informer

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[4]Jurors Tritz [RT 2010], Lewis [RT 2018-2021], Service [RT 2025-2026], Keasey [RT 2031], Owen [RT 2034], Cole [RT 2039-2040], McCallen [RT 2043] (later excused [RT 2713-2714] because she said that her "mind was made up before this happened," [RT 2044]), Stein [RT 2048-2049] and Morrow [RT 2061].

[5]The connection between the use of this term and the testimony of the alleged victim in the case at bar suggesting that the "syndicate" was at work [RT 932] did not go unnoticed by Juror Morrow [RT 2061].

"was Marshall Caifano, reputedly one of the rising lords of the Chicago crime syndicate . . . currently in Los Angeles standing trial under the name of Johnny Marshall . . . on charges of trying to extort $60,000 from millionaire oil man Ray Ryan;"

"Barbe has said he feared for his life ever since he turned informer . . . even though he said Caifano, alias Johnny Marshall, had given him permission to 'go ahead and make a deal for yourself'."

The State's attorney is quoted as saying that "the explosion was the work of 'agents of this human vermin' — the crime syndicate." The story also set forth details of the alleged offense, stating that petitioner, and others had been indicted on charges of conspiracy in a fake insurance plot involving a fake hijacking.

The Herald-Examiner's Night, Sunset, and Star Editions carried similar prominent headlines and stories also on their first pages [Exs. MM-1, 3, 16].

The Los Angeles Times Preview Edition of January 28, 1964, carried on its front page a picture of Mr. Barbe lying on the ground beside his car [Ex. MM-4]. The story concerning the picture was on an inner page and carried the headline "Bomb last Cosa Nostra witness." It described the anguish of the victim and stated that one of the eight defendants in the case in which Mr. Barbe was to be a witness, "Is Marshall Caifano, alleged syndicate hoodlum on trial in Los Angeles under the name of Johnny Marshall in an extortion case," and that it was Barbe who exposed the plot and cooperated by holding conversations with Caifano and others in his insurance office (*Ibid.*).

Similar pictures and stories were carried in the Los Angeles Times Morning Edition for January. 28th [Exs. MM-5, 6], the Los Angeles Herald-Examiner First Edition for January 28th [Ex. MM-7], the Metropolitan Edition of the Hollywood Citizen News of January 28th [Ex. MM-8], the January 27th Home Edition of the Long Beach Press Telegram [Ex. MM-9].

Likewise, the Los Angeles radio and television stations carried the Chicago story on their Newscasts of January 27, 1964 [Ex. MM-10]. In so doing, they used such terms, referring to petitioner, as:

> "Cosa Nostra",
>
> "a fellow defendant, Marshall Caifano, is on trial in Los Angeles on an extortion charge under the name of John Marshall",
>
> "Mafia",
>
> "The syndicate",
>
> "it has struck again",
>
> "Chicago officials say tonight there is a link between a gangland bombing in the windy city today and a man in Los Angeles", "the attempt to blow up a Government witness is the work of 'this human burden [sic] — the crime syndicate'."

Barbe's fellow swindlers "included Marshall Caifano, a Chicago resident, who is rumored to belong to the syndicate",

> "when Caifano heard in Los Angeles about the explosion, he said 'no kidding;' "
>
> "Barbe is the man who named Caifano as one of his partners in the Chicago mobsters' plot to defraud an insurance company."

> "The Marshall Caifano referred to is on trial under the alias of Johnny Marshall here in Los Angeles. He is reputedly one of the rising members of the Chicago Crime Syndicate."

It may be to some that this type of "evidence" coming to the attention of a jury trying a criminal case may be merely a statement of "something of a bad reputation," but in the hard reality of life, this publicity effectively prevented the defendant from having a fair trial. *Cf. Michelson v. United States,* 335 U.S. 469.

The Court below, recognizing the prejudice inherent in the jury's being advised that the defendant has been convicted of a crime (*Cf. Reed v. Beto,* 969 this Court, Oct. term 1965, pending on writ of certiorari), said that "nowhere . . . is there any reference to a specific *conviction* of any defendant." [CT 353, Appx. A, p. 12]. Yet, but a few lines further, the court acknowledges that one of the stories stated that petitioner had been arrested in Las Vegas for failure to register as an "ex-felon." This "report" appears in Exhibit MM-11 which also volunteers the information that Marshall "is on Nevada's 'black list' of underworld figures not welcome in the gambling casinos." The court below disposes of the "ex-felon" reference by asserting, after stating that it did not know if the matter is true, that [CT 354, Appx. A, p. 12] petitioner "brought the matter on himself, and cannot complain if he was arrested, and the placing of such a charge against him was reported by news media"! With due respect, we submit, the court missed the point; there is nothing in the record from which it can be inferred that petitioner brought the matter on himself. The point is that without petitioner's having anything to do with it, material appeared in

the press of a nature which would prevent his obtaining a fair trial.

At least one of the Los Angeles papers [Ex. MM-17], and the Chicago Tribune which was distributed in Los Angeles [Ex. MM-14], carried the statement by the victim of the Chicago incident: "I don't know who actually carried out the bombing, but I know he (Caifano) engineered it." The court below was satisfied to dispose of this story by saying [CT 354, Appx. A, p. 12], "There was no proof any juror saw, or had the opportunity to see, or read or hear this story." What the court overlooked, however, is that this story appeared after the jury had been interrogated and the trial court refused, contrary to its duty under *United States v. Accardo,* 298 F. 2d 133 (CCA 7, 1962), to further interrogate the jury to see if members thereof did indeed see, hear or read the story or had the opportunity to do so. [RT 2192, 2211, 2214].

Having in mind the nature of the charge against petitioner here and the nature of the newspaper publicity concerning him, petitioner submits that it was simply impossible for him to have had a fair trial. The court below adopted the rule [CT 355, Appx. A, p. 13], relying on *Beck v. United States,* 369 U.S. 541, 558, "that the burden to show a defendant has been unfairly treated is on that defendant." In other words, that under circumstances such as these, the defendant must show prejudice, presumably by one or more of the jurors stating that he was affected by the publicity. We urge not only that this is an impossible burden and an improper way of dealing with the free press-fair trial issue, but also that the showing of prejudice requirement has been rejected by this Court in the later *Rideau*

v. Louisiana, 373 U.S. 723 and *Estes v. Texas,* 381 U.S. 532, cases; and that if these cases have not so rejected the doctrine, this Court should do so now by granting a hearing herein. See Brief of the American Civil Liberties Union as *amicus curiae* in *Sheppard v. Maxwell, supra,* 490, Oct. Term 1965, pages 25-27.

Furthermore, with due respect, the record does not support the inability of the court below [CT 355, Appx. A, p. 14] to perceive that the prejudicial material did get to the jury. It would be contrary to the teachings of human experience to suggest, even from what the jurors told the trial court, reluctant as they concededly were, that they did not read, hear or see more than merely "a general reference to a bombing of and serious injury to a witness in Chicago to events connected with a Cosa Nostra insurance racket-syndicate-investigation in that city." (*Ibid.*).[6]

There is an additional reason why the prejudicial publicity which occurred warrants certiorari herein. That reason is to give guidance to trial courts, when faced with the problem presented in this case and their *Accardo* duty to question the jurors as to the manner in which the jurors should be questioned on that subject. In the trial court, defendant moved the Court [RT 2219, 2221] for a mistrial (which the court denied [RT 2221]) on the additional ground that the language of the Court's interrogation of the jurors further prejudiced defendant's right to a fair jury. For example, in interrogating the jurors and in advising them that he was questioning them because of the publicity which had occurred, the Court said *inter alia*, "the *defendants*

[6]We set out as Appendix D, excerpts from the jurors' statements to the trial court.

have objected." [RT 2002]. "the *defendants* are worried for fear there have been things in the paper that have gotten — and the TV that have gotten to the members of the jury that might prejudice them in some way," [RT 2007] "the *defendants* are concerned, because of the fact that there is a lot of publicity going on which *they* are afraid might prejudice the jury if it gets to them," [RT 2013] "there is a lot of publicity going on around this case, and the *defendants* are a little concerned about it." [RT 2017] "There has been some newspaper stories which are highly prejudicial, I think to the *defendant*," [RT 2030], "there have been a lot of stories in the papers lately that are detrimental to the *defendant*," [RT 2034]. "There has been some publicity which is detrimental to the *defendants*, the *defendants* are concerned about it, and I think they are entitled to be," [RT 2038]. "There has been a lot of publicity that the *defendants* are concerned about," [RT 2042]. "This matter has been so highly prejudicial that I felt it might be well for me to know just what — just what exposure each member of the jury has had to it," [RT 2047]. "There has been so much of it lately that the *defendants* are a little concerned," [RT 2055], "in view of the *complaints made by the defendants* that it has been harmful to them." [RT 2059] [emphasis added].

It is submitted that the matter of such newspaper and television material coming to the attention of the jury, material which the trial court itself characterized as "not . . . proper evidence in this case," [RT 2002], "a lot of information which is not admissible," [RT 2023], "newspaper stories which are highly prejudicial, I think to the defendant." [RT 2030, 2047]. "Stories in the newspapers lately that are detrimental to the de-

fendant," is not the concern of merely the defendant, but rather the concern of the Court and the prosecution as well. Indeed, it is the concern of the administration of justice. And the trial courts should be made aware of their duty to conduct their examinations consonant with that concern.

In the case at bar, with the prejudicial material coming to the attention of at least half the jurors, coupled with the knowledge imparted by the Court to the jurors that it was the defendants who had caused the jurors to be interrogated,[7] petitioner submits that he did not have a fair trial before an impartial jury.

The matter calls for guidelines from this Court.

2. In its opinion, the court below did not discuss nor even mention one of the most fundamental principles of constitutional law and criminal justice raised by the petitioner. That principle is, as applied to the instant case, that the defendant was entitled to, and though he requested it [CT 209, 211], was refused [RT 2697], an instruction to the jury that in order to find defendant guilty, it must be unanimous as to what act or acts defendant performed and as to with what intent defendant traveled. This omission by the court below was called to its attention in the Petition for Rehearing, but the court still did not deal with the point. The instructions requested by the defendant are set out hereinafter in Appendix E.

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[7] *Cf.* Juror Hules who said "she was scared to death" [RT 2005], another who said she was "concerned" [RT 2005], another who was "a little nervous" [RT 2023]. The Court felt that "everybody is upset or worried about coming in here," [RT 2028; see also, 2041, 2045, 2051] that they "come in with great apprehension" [RT 2058]. One juror put it: "I think they are all scared to death." [RT 2050].

The principle is basic. Without such an instruction, the jury is permitted to return a verdict of guilty though it is not in agreement, contrary to the principle set forth in *Andres v. United States,* 333 U.S. 740, 748: "Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply." Especially in the instant case, where the statute is so amazingly complex and complicated, was such an instruction essential and this Court should grant review so as to make the law clear for the future that where the statute creates, and the indictment charges, more than one crime or more than one way of committing the crime, the jury must be instructed that it must be in agreement as to the crime or crimes committed or as to the manner by which they were committed before it can return a verdict of guilty.

The statute creates no less than 200 crimes, or 200 different ways of committing the crime. Limiting the discussion to the allegations in the indictment here, they are:

(a) Travel in insterstate commerce;

(b) (1) With intent to distribute the proceeds of extortion; or

(2) With intent to commit any crime of violence to further extortion; or

(3) with intent to promote extortion; or

(4) With intent to manage extortion; or

(5) With intent to establish extortion; or

(6) with intent to carry on extortion; or

(7) With intent to facilitate the promotion of extortion; or

(8) With intent to facilitate the management of extortion; or

(9) With intent to facilitate the establishment of extortion; or

(10) With intent to facilitate the carrying on of extortion; and

(c) (1) To thereafter perform the act of distributing the proceeds of extortion; or

(2) To thereafter perform the act of committing any crime of violence to further extortion; or

(3) To thereafter perform the act of promoting extortion; or

(4) To thereafter perform the act of management of extortion; or

(5) To thereafter perform the act of establishing extortion; or

(6) To thereafter perform the act of carrying on extortion; or

(7) To thereafter perform the act of facilitating the promotion of extortion; or

(8) To thereafter perform the act of facilitating the management of extortion; or

(9) To thereafter perform the act of facilitating the establishment of extortion; or

(10) To thereafter perform the act of facilitating the carrying on of extortion; or

(11) To thereafter attempt to perform the act of distributing the proceeds of extortion; or

(12) To thereafter attempt to perform the act of committing any crime of violence to further extortion; or

(13) To thereafter attempt to perform the act of promoting extortion; or

(14) To thereafter attempt to perform the act of managing extortion; or

(15) To thereafter attempt to perform the act of establishing extortion; or

(16) To thereafter attempt to perform the act of carrying on extortion; or

(17) To thereafter attempt to perform the act of facilitating the promotion of extortion; or

(18) To thereafter attempt to perform the act of facilitating the management of extortion; or

(19) To thereafter attempt to perform the act of facilitating the establishment of extortion; or

(20) To thereafter attempt to perform the act of facilitating the carrying on of extortion.

The figure of 200 set out above is arrived at in the following manner: The statute provides for 10 different intents with which one may travel in interstate commerce in violation of the statute, and it then provides for 20 different ways of thereafter completing the offense as to each of these intents; 10 x 20 equals 200.

Both counts 1 and 3[8] were framed in the language of the statute. [CT 2, 6] Count 3 differs from Count 1, the conspiracy count, in these two respects (aside, of course, from the allegations of conspiracy): (1) there is no charge in Count 3 of travel with intent to distribute the proceeds of extortion, and (2) there is no charge of travel with intent to *facilitate the establish-*

[8]We omit discussion of Count 2 because of petitioner's acquittal on that count, although its presence before the jury for its consideration could only have served to confuse it further.

ment of extortion. These are significant omissions, for the Grand Jury must be presumed to have known what it was doing when it framed the language of the indictment, and, perforce, felt that as to the intents mentioned, there was not sufficient evidence even to charge those offenses. Therefore, the Grand Jury differentiated, as was proper, between the various intents set forth in the statute. Yet, by the trial court's refusal of the requested instructions, the jury was not required, on the more serious question of guilt, to differentiate between the various intents and "thereafter" acts that were charged in the indictment.

Thus, the jury was permitted to convict the defendant although it was not instructed that it must be unanimous and in agreement as to which of the various and sundry offenses charged against defendant had been committed, if any. In other words, by way of example, by the refusal of the court to instruct as requested by defendant, the jury was allowed to convict the defendant, although some of the jurors might believe that the intent of the defendant in traveling in interstate commerce was to commit a crime of violence to further extortion, while others might believe that the travel in interstate commerce with with the intent to facilitate the management of extortion. Accordingly, the jury was empowered to return less than a unanimous verdict. That the trial court intended this result is clear; it said so in so many words in its refusal to give the requested instruction [RT 2689]:

> ". . . If some of them think they constitute establishment, and if some others think they constitute promotion, that is a distinction which I think should not be made in the instruction, at least, or is it a vital distinction in the case."

With due respect, petitioner disagrees. The distinction is indeed vital. To hold otherwise, is simply to disregard both the language of the statute and of the indictment.

In *Andres v. United States,* 333 U.S. 740, 748, the statute permitted the jury, if it so decided, to qualify its verdict by adding thereto "without capital punishment"; and whenever such a qualified verdict was returned, the person should be sentenced to imprisonment for life. If the qualified verdict be not returned, then the death penalty was mandatory. The trial court instructed (333 U.S. at 751) that "before you may return a qualified verdict of murder in the first degree without capital punishment, that your decision to do so must, like your regular verdict, be unanimous." In other words, once the jury found the defendant guilty, the punishment would be death, unless the jury unanimously found that there should be no capital punishment. This meant that there could be capital punishment with less than all the jurors agreeing that there should be. The Supreme Court held this to be error. After pointing out the uninimity requirement, the court gave examples as to how a proper instruction should have been given. Thus (p. 752),

> ". . . an instruction that a juror should not join a verdict of guilty, without qualification, if he is convinced that capital punishment should not be inflicted, would have satisfied the statute and protected the defendant. Or the jury might have been instructed that its conclusion on both guilt and punishment must be unanimous before any verdict could be found."

This latter type of instruction suggested by the Supreme Court is precisely the kind of instruction defendant requested the Court to give in his requested Instruction No.'s 48 and 50. Here, as in *Andres,* the instructions given did not protect the defendant. See, also, *Williamson v. United States,* 332 F. 2d 123, 133-134 (CA 5 1964) and *Williams v. United States,* 131 F. 2d 21, 22 (CA DC 1942).

State cases are in accord:

California

People v. Dutra, 75 Cal. App. 2d 311, 322, 171 P. 2d 41 (1946):

". . . the instructions in this connection left the jury free to convict on this count although the jurors may not have been in agreement with respect to the commission of any particular act or omission, as being calculated to cause or tend to cause the result in question. There is evidence here of a number of different acts which might be responsible for such a result, and there is nothing to show that some of the jurors did not base their verdict on some of these acts and other jurors on other acts. Under these circumstances, it can neither be held that error does not appear nor that it was not prejudicial. . . ."

People v. Thompson, 144 Cal. App. 2d Supp. 854, 301 P. 2d 313 (1956):

"Where, as in this case, the proof of either of two facts constitutes the offense charged, the jury should be instructed that all twelve must agree that one fact or the other is established; it will not do

for part of them to agree on the existence of one fact, the rest of them concluding that the other fact alone was established. (citations)"

To the same effect:

People v. Williams, 133 Cal. 165, 169 (1901);

People v. Hatch, 13 Cal. App. 521, 535-536, 109 Pac. 1097 (1910);

People v. Scofield, 203 Cal. 703, 710, 265 Pac. 914 (1928);

People v. McMillan, 45 Cal. App. 2d Supp. 821, 830, 114 P. 2d 440 (1941);

People v. Hoenschle, 132 Cal. App. 387, 389, 22 P. 2d 777 (1933);

People v. Anderson, 199 Cal. App. 2d 510, 521, 1 Cal. Rptr. 793 (1962).

Rhode Island

State v. Harris, 152 A. 2d 106, 110 (1959);

State v. Gannites, 161 A. 2d 818 (1960).

New York

People v. Hicks, 287 N.Y. 165, 38 N.E. 2d 482, 485 (1941).

The error of the trial court in failing to give the unanimity instructions requested was compounded by the Court's failure and refusal [RT 2681-2685] to define the various intents set forth in the statute [CT 200-208; Defendant's Requested Instructions No. 39-47]. Demonstration of the confusion under which the jury was laboring is dramatically shown by the fact that during the course of its deliberations, it asked for a dictionary [RT 2726].

That the defendants were correct in asking the Court to define the various words of the statute was acknowledged by the Court, albeit too late. During the argument on the motion for new trial, the Court stated [RT MNT 66-67]:

> "Mr. Okrand, it might be well at this time to clear up what actually happened; although I don't know that it actually makes any great difference. Early in the proceeding I think I did, when we were discussing before the jury went out, refuse to give them.
>
> ". . .
>
> "Then at a subsequent time after they had asked for the dictionary and we refused to let them have the dictionary, I intended to give them to the jury and I then prepared a set of instructions with that taken from the dictionary. The jury came in before I had an opportunity to give them it.
>
> "So you are correct in saying that the jury did not have them in the first instance. But I would like to get what little glory, if glory there be in it, that I was—at the time the jury rendered a verdict, that we were attempting to get to the jury those instructions.
>
> ". . .
>
> "The result is that they did not have them, and you are very correct in that."

The case is one, therefore, wherein "the several jurors could range over the evidence at will, and pick out any one of the dozen of more offenses proven, and found his verdict thereon. No court can say from this record of which offense proven under this indictment the jury

found the defendant guilty." (*People v. Hatch,* 13 Cal. App. 521, 535; *Cf. Stromberg v. California,* 283 U.S. 359, 370).

3. Count Three of the indictment [CT 6] failed to charge an offense under the statute and the effort of the court below to cure this defect by reference to Count I, denied to defendant his fundamental right under the Fifth Amendment not to be tried save under an indictment returned by the Grand Jury. It is axiomatic that "(a)n indictment is required to set forth the elements of the offense sought to be charged." (*United States v. Debrow,* 356 U.S. 374, 376).

The Court below recognized the defect of the indictment on its face but sought to save it by saying [CT 350], "Count III, applying to acts in Nevada alone would necessarily require a violation of the Nevada statutes (Title 16, Nevada Revised Statutes, §205.314 or 205.325)." (footnotes omitted).

Petitioner submits that the Court's conclusion does not "necessarily" follow. The statute under which petitioner was indicted (18 USC 1952) requires that the "unlawful activity", both as to the travel in interstate commerce with intent and the "thereafter" acts, be "in violation of the laws of the State in which committed or of the United States." There is nothing in Count III of the indictment which warrants the conclusion that the Grand Jury had in mind the extortion laws of Nevada[9] and not those "of the United States." For the Court to have inserted in the indictment, the words [CT 350] "violation of the Nevada statutes", is simply for the Court to have amended the indictment.

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[9]Or even of California's or some other state's.

Certainly, the principle of *Ex parte Bain,* 121 U.S. 1, is, as recognized by this Court in *Stirone v. United States,* 361 U.S. 212, 217, still valid. In *Bain,* this Court said (121 U.S. at 10):

> "If it lies within the province of a court to change the charging part of an indictment to suit its own notion of what it ought to have been, or what the grand jury would probably have made if their attention had been called to the suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer', may be frittered away until its value is almost destroyed."

Accord:

Russell v. United States, 369 U.S. 749, 770.

Furthermore, with reference to the Court of Appeal's statement that Count III applies "to acts in Nevada *alone*" (emphasis added), there is nothing in the general allegations [CT 6, lines 10 to 15] as to the "thereafter" acts to be performed or attempted to be performed, nor in the specific acts alleged in the Count [CT 6, lines 16 to 18], from which even an inference could be drawn that those acts were committed or attempted to be committed in Nevada and not in California or some other state. Thus, petitioner now stands convicted "upon a charge not made," and, therefore, in "sheer denial of due process." (*De Jonge v. Oregon,* 299 U.S. 353, 362.)

Moreover, Count III is not saved, as the Court below apparently thought it could be [CT 350, Appx. A,

p. 7], by the Court's reference to Count I which (*Ibid.*) "charged the extortion was illegal under the laws of Nevada and California." To so do flies directly in the teeth of the lower Court's own holding in *Walker v. United States*, 176 F. 2d 796, 798 (1949):

> "(The) contention (that one count of an indictment can be cured by reference to another count) ignores the rule that each count in an indictment is regarded as if it were a separate indictment and must be sufficient in itself. Therefore, it must stand or fall upon its own allegations without reference to other counts not expressly incorporated by reference."

Accord:

McClintock v. United States, 60 F. 2d 839, 840 (CCA 10 1921);

Dunn v. United States, 284 U.S. 390, 393.

In addition, the Court's amendment violated due process. Thus, the Court said [CT 350; Appx. A, p. 7] that "Count III . . . would necessarily require a violation . . . of Title 16, Nevada Revised Statutes, §205.315 *or* 205.325." (footnotes omitted; emphasis added). In other words, Count III, according to the Court's interpretation thereof, alleges a violation of either §§205.315 *or* 205.325. Such a disjunctive charge is not permissible. While it is true that the Grand Jury may charge in the *conjunctive*, it is equally true that not even the Grand Jury may charge in the disjunctive. (*United States v. Clarke*, 20 Wall. [U.S.] 92, 22 L. ed. 320, 322).

4. This Court has not yet passed upon the constitutionality of 18 USC 1952. It should. The statute is

a complex, comprehensive statute passed in 1961, as one of "The Attorney General's Program to Curb Organized Crime and Racketeering." (Hearings before the Senate Committee on the Judiciary, 87th Congress, 1st Sess. on S. 1653, S. 1654, S. 1655, S. 1656, S. 1657, S. 1658, S. 1665, p. 1; Hearings before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong., 1st Sess. on H.R. 468, H.R. 1246, H.R. 3021, H.R. 3022, H.R. 3023, H.R. 3246, H.R. 5230, H.R. 6571, H.R. 6572, H.R. 6909, H.R. 7039). Of the bills mentioned in the titles of the above hearings, H.R. 6572 and S. 1653 emerged as and became 18 USC 1952 (2 U.S. Code Congressional and Administrative News [1961] 2664).

During the course of the hearings a number of doubts were voiced as to the validity of the proposed statute. For example, Mr. Rufus King, appearing on behalf of the American Bar Association, characterized the bill as being "an important innovation," several features of which "trouble me very much." (Sen. Hrgs. *supra,* p. 93). And that he could "foresee both enforcement and constitutional problems about . . . making it an offense to take a trip with something in the back of your mind about committing a crime." (*Ibid.,* p. 95). Senator Irvin expressed similar concern (*Ibid.,* pp. 251, 253, 258). Even Assistant Attorney General Herbert J. Miller, testifying for the Justice Department, stated that "the concept startled me." (*Ibid.,* p. 254). Senator Kefauver was concerned about the word "facilitate" and asked "Isn't that a pretty broad word?" (*Ibid.,* p. 106). He also felt, obviously for constitutional reasons, that the bill as presented by the Justice Department would have to be changed (*Ibid.,* p. 259) and Senator Carroll

joined Senator Irvin who had described as "dangerous", attempts "to create crimes out of intents in the minds of people unaccompanied by acts" (*Ibid.*, p. 328).

It is true that the bill as first presented and which did not have any requirement for the commission of any act following the travel in interstate commerce with the prohibited intent (House Hrgs. *supra*, p. 9) was thereafter changed to require post travel conduct. as the statute now reads (Conference Report to Accompany S. 1653, House Reports 1161 and 966; 2 U.S. Code Cong. & Adm. News [1961] 2664), but the thrust of the completed statute is the same. Assistant Attorney General Miller testified that the bill even as first written, required some overt act in the state to which travel is made (Sen. Hrgs. p. 259), and the statute as it now stands is still but a "travel with intent" statute "designed to aid State law enforcement officials" (*Ibid.*, p. 261).

Since what 18 USC 1952 really does is enforce the State criminal laws (the same travel with the same intent to a state which did not make illegal the conduct [*e.g.* travel to Nevada in aid of gambling] would be no crime under the statute), the same considerations which prompted this Court to invalidate the legislation involved in cases such as *Linder v. United States*, 268 U.S. 5 and *United States v. Constantine*, 296 U.S. 287, are also applicable here. See also, *United States v. Five Gambling Devices*, 346 U.S. 441. And compare, *United States v. Kahriger*, 356 U.S. 22 which upheld the statute there involved precisely because it was not directed at conduct illegal under state law but was directed at all persons engaged in the gambling business whether illegal or not.

There have been and, presumably, will continue to be many prosecutions under the statute (see annotations under 18 USCA 1952). An authoritative decision by this Court as to its constitutionality should be made.

Conclusion.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

John Marshall and Charles Del Monico, Appellants. vs. United States of America, Appellee. No. 19,383.

[January 27, 1966]

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes, Hamley and Jertberg, Circuit Judges

Barnes, Circuit Judge:

Three of four alleged conspirators were indicted by a grand jury in Count I of a three count indictment, alleging a conspiracy to travel in interstate commerce with intent to aid racketeering enterprises (18 U.S.C. §1952).

The three indicted were John Marshall (also known as Marshall Caifano), Charles Del Monico (also known as Charles Tourine, Jr.) and Allen Smiley (also known as Aaron Smehoff). The fourth unindicted coconspirator was Nicholas Dandolas (also known as Nick the Greek).

The "racketeering enterprises" were alleged to have been: to travel in interstate commerce with intent to (1) distribute the proceeds of unlawful activity namely: extortion and (3) promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of unlawful activity, namely: extortion; and to thereafter perform and at-

tempt to perform acts specified in (1), (2) and (3) above, in violation of Title 18, United States Code, Section 1952.

The objects of said conspiracy were alleged to have been accomplished by the conspirators and the unindicted coconspirators traveling in interstate commerce to locate, and in violation of Nevada and California law to extort, money from one Ray Ryan. There then followed in Count I a recital of some fifteen alleged overt acts.

In Count II, the two appellants were charged with traveling from Las Vegas, Nevada, to Palm Springs, California, on April 26, 1963, for the purpose of committing the crime of extortion. (18 U.S.C. § 1852.) Allen Smiley was named as an aider and abettor (18 U.S.C. § 2). The trial judge granted an acquittal on this count as to all defendants. As to Smiley, the motion was granted before the case went to the jury, as to appellants, after their conviction by the jury.

In Count III, the three defendants were charged with traveling from Palm Springs, California, to Las Vegas, Nevada, on May 1, 1963, for the purpose of committing the crime of extortion. Smiley was granted an acquittal before the case went to the jury—the motion of the other defendants for acquittal was denied both after the evidence was in and after the guilty verdict.

Marshall was sentenced to five years, consecutively, on both Counts I and III, Del Monico to five years concurrently on each of Counts I and III.

Appellant Marshall urges error on eleven grounds; appellant Del Monico on six—but Del Monico also urges error as to him on all grounds raised by appellant Marshall, and not specifically raised by Del Monico. We consider each in turn.

I—*The Statute.*

Section 1952 of Title 18, United States Code, reads in material part as follows:

". . .

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violance to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

. . ."

Section 1952(a)(1), though charged in Count I, has no bearing on this case: there were no proceeds of unlawful activity to "distribute." Appellants were charged in both substantive Count III and conspiracy Count I

with interstate travel or interstate use of a facility with the intent to perform the acts prohibited by both subsections (2) and (3) of § 1952(a), and thereafter performing such acts, or attempting to perform them.

The acts prohibited by the statute were the commission of any crime of violence with the intent to further any "unlawful activity"; or to promote or facilitate any "unlawful activity."

"Unlawful activity," as used in § 1952(a)(1), (2) and (3) is defined in § 1952(b) (insofar as herein material) as:

> "(2) extortion . . . in violation of the laws of the State in which committed or of the United States."

It is obvious that the phrase "business enterprise," used in subsection (1) of § 1952(b), is not used in § 1952(b)(2). We conclude, therefore, "business enterprise" applies only to the offenses listed in subdivision (1)—namely: gambling, liquor, narcotics and prostitution offenses, and not to the extortion mentioned in subdivision (2).

This seems to be the plain meaning of the language used in the statute, and thus needs no legislative history to interpret it. But additionally, a fair reading of the legislative history indicates that its proponents believed the main target (but not the sole target) of the legislation, was interstate travel to promote gambling. (Hearings of Subcommittee No. 5 of Comm. on the Judiciary, H.R., 87th Cong., 1st Sess. on H.R. 468; and Hearings Comm. on the Judiciary, U.S. Senate, 87th Cong., 1st Sess. on S. Bill 1653. See also letter from Attorney General Kennedy, S. Rep. No. 644, 87th Cong., 1st Sess., p. 3 (1961).) Lesser targets

were the "businesses" of traffic in liquor, narcotics and prostitution. Subdivision (2) of the § 1952(b) had a more specific target (even though perhaps a less important target): extortion, as defined by state laws. It was a single act of extortion (not necessarily a continued course of extortion) which had been accomplished or facilitated by interstate travel that the second subsection of § 1952(b) sought to prevent and punish.

United States v. Teemer, 214 F.Supp. 952, 958 (N.D.W.Va. 1963) is the only case cited by appellant Marshall in support of his position that a single act of extortion is not prohibited—there must be a continuous course of business. The language quoted in appellants' brief is accurate, though not complete. But that case concerns itself only with § 1952(b)(1). On page 954, where Judge Paul quotes the "pertinent part" of section 1952 (see n. 1 of that opinion) only subdivision (1) of (b) of § 1952 is quoted—subdivision (2) is omitted as not pertinent. The language quoted is thus applicable only to the § 1952(b)(1) crime therein charged, which is not the crime here charged.

We hold § 1952(b)(2) does apply to the facts charged herein—travel with intent to carry on or facilitate an unlawful activity—to-wit: a single act of extortion.

II—*Failure to dismiss the indictment.*

Appellants claim their right to due process was denied, in that the statute is vague, and they were not given notice of the crime charged. They relied particularly on *Russell v. United States,* 369 U.S. 749 (1962), and cases there discussed, as well as *Van Liew v. United States,* 321 F.2d 664 (5th Cir. 1963.)

We ruled on this in *Turf Center, Inc. v. United States*, 325 F.2d 793 (9th Cir. 1963).

As *United States v. Teemer, supra,* points out (p. 956-7), *Russell v. United States, supra,* is a case where appellants were charged with failing to answer questions put to them by a congressional committee. The statute requires such a question must be one "pertinent to the question under inquiry." The indictment stated only that the question asked and unanswered was "pertinent to the question under inquiry," and did not state what the "question under inquiry" was. The Supreme Court held the indictments were bad for lack of particularity. The government itself, in *Russell v. United States, supra,* was not consistent in stating what the question under congressional inquiry was. Thus, the Supreme Court felt it was impossible to ascertain if the question at which the witness balked was within or without the scope of congressional inquiry. We agree. But as we said in *Turf Center, Inc., supra,* in holding the same statute met the constitutional requirements: "*Russell v. United States* represents an exception to the rule and is not in point here." *Indem.* p. 796. Here appellants were accused of interstate travel to facilitate the location of Ray Ryan and the extortion of money from him. Further, here, as in *United States v. Teemer, supra,* there was more than a "bare-bones" indictment in statutory language. There were, for example, ten specific acts charged in Count II and six specific acts charged in Count III, and fifteen overt acts allegedly committed by appellants charged in Count I. As this court said in *Turf Center, Inc. v. United States, supra,* the statute (§ 1952) embodied all the elements of the offense. *Cf. Robison v. United States,* 329 F.2d 156

(9th Cir.), *cert. den.* 379 U.S. 859 (1964); *Rood v. United States,* 340 F.2d 506 (8th Cir. 1965); *United States v. Spada,* 331 F.2d 995 (2d Cir. 1964); *Worthy v. United States,* 328 F.2d 386 (5th Cir. 1964); *Bass v. United States,* 324 F.2d 168 (8th Cir. 1963); *United States v. Borgese,* 235 F.Supp. 286 (S.D.N.Y. 1964); *United States v. Barrow,* 212 F. Supp. 837 (E.D.Pa. 1962); *United States v. Smith,* 209 F.Supp. 907 (E.D. Ill. 1962).

The statute refers to the crime of extortion, "as defined by the laws of the state in which committed," or of the United States. Count I charged the extortion was illegal under the laws of Nevada and California. Count III, applying to acts in Nevada alone, would necessarily require a violation of the Nevada statutes (Title 16, Nevada Revised Statutes, § 205.315[1] or 205.325[2]).

Appellants next urge that § 1952 is in excess of the power granted Congress under Art. I, Sec. 8, the Commerce Clause. Appellants rely on *Linder v. United States,* 268 U.S. 5 (1925), holding Congress could not, under the guise of taxation, control the practice of medicine under the state law. But the practice of medi-

[1]Section 205.315 reads, in pertinent part:

"If any person, either verbally or by any written or printed communication, shall maliciously threaten any injury to the person or property of another, with intent thereby to extort money, or any pecuniary advantage whatever, or to compel the person so threatened to do any act against his will, he shall be punished. . . ."

[2]Section 205.325 reads, in pertinent part:

"Every person who, under circumstances not amounting to robbery, shall extort or gain any money, property or advantage, . . . or any property, by means of force or any threat, either:

2. To do injury to any person or to any property; . . .

* * *

shall be guilty of extortion and shall be punished . . ."

cine is not illegal. Could not Congress pass a law to prevent interstate travel for the purpose and with the intent to practice medicine illegally—such as unlawful abortions? We think so. And see: *United States v. Zizzo,* 338 F.2d 577 (7th Cir. 1964); *United States v. Borgese,* 235 F.Supp. 286 (S.D.N.Y. 1964); *United States v. Ryan,* 213 F.Supp. 763 (D.Colo. 1963); *United States v. Barrow,* 212 F.Supp. 837 (E.D. Pa. 1962); *United States v. Smith,* 209 F.Supp. 907 (E.D. Ill. 1962). Nor do we believe that § 1952 constitutes an attempt to enforce state criminal laws, and therefore is violative of the Tenth Amendment: "It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states." *United States v. Darby,* 312 U.S. 100, 114 (1941), overruling *Hammer v. Dagenhart,* 247 U.S. 251 (1918). See also discussion in *Hoke v. United States,* 227 U.S. 308, 321 (1913).

III.

We next consider the position urged by appellants that the jury was permitted to consider overt acts alleged to have been in furtherance of the conspiracy which took place prior to the conspiracy. This because Count II (travel between Nevada and California with intent, etc.) was dismissed "because there is no evidence upon which that count can be sustained." The overt acts in the conspiracy count were alleged to have begun on April 16, 1963, and continued to May 2, 1963 (C.T. 3-4), but the conspiracy was alleged to have taken place between April 1, 1963 and May 2, 1963.

Because substantive Count II was dismissed, appellants urge that any conspiracy to travel from California

to Nevada (substantive Count III) must have been entered into, at the earliest, "sometime after defendants left Ray Ryan at the Palm Springs Airport 6:30 to 7:30 P.M. on the evening of April 30, 1963." Overt acts 8, 10 and 15, referring to acts of coconspirator Smiley, were withdrawn from the jury's consideration but appellants object that overt acts 1 to 7, inclusive, referring to acts of codefendants Marshall and Del Monico were not withdrawn, and all were acts occurring prior to Ryan's departure from the Palm Springs Airport on April 30, 1963.

There is no question that the overt acts charged must effect the object to the conspiracy, and until the conspiracy comes into existence, no act occurring prior thereto can effect it.

We cannot agree that because the court determined the evidence was insufficient to support a conviction of the substantive offense charged in Count II, that all evidence indicating a conspiracy to violate § 1952, charged in Count I, commencing April 1, 1963, up to 6:30 P.M. of April 30, 1963, must be stricken and removed from the jury's consideration.

We cannot agree primarily because we cannot accept appellants' thesis that the conspiracy charged in Count I, and alleged to have been effected in part by overt acts 1 to 7 between April 16, 1963 and 6:30 P.M. on April 30, 1963, could *only* have been entered into *after* 6:30 P.M. on April 30, 1963. Such a conclusion does not, of necessity, follow.

Three different crimes were charged in the original indictment: I, the conspiracy count; II, the substantive count relating to the travel from Las Vegas to Palm

Springs; and III, the substantive count relating to the travel from Palm Springs to Las Vegas.

It has repeatedly been held that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. *United States v. Rabinowich,* 238 U.S. 78, 85-6 (1915).

If both substantive counts had been dismissed, could appellants urge that the conspiracy count should have been dismissed because no overt acts remained? We think not. *Braverman v. United States,* 317 U.S. 49, 54 (1942); *Goldman v. United States,* 245 U.S. 474, 477 (1918); *United States v. Magliano,* 336 F. 2d 817, 822 (4th Cir. 1964); *Carter v. United States,* 333 F. 2d 354, 356-7 (10th Cir. 1964); *United States v. Manton,* 107 F.2d 834, 838 (2d Cir. 1938), *cert. den.* 309 U.S. 664 (1940).

We need not recite the evidence (as was done in appellee's brief) to establish there existed substantial evidence from which the jury could infer[3] that the conspiracy began prior to the April 15th, 1963, meeting between Del Monico and Marshall at Las Vegas, Nevada, just prior to their auto trip to Palm Springs (Appellee's Brief, pp. 144-146, inclusive), and prior to overt acts 1 to 7, inclusive.

IV.

We next consider appellants' point that publicity "read, seen and heard by the jury" resulted in an unfair trial.

A motion for mistrial was made on behalf of each defendant on Tuesday, January 28, 1964, after the con-

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[3]*Glasser v. United States,* 315 U.S. 60, 80 (1942); *Esso Corp. v. United States,* 340 F.2d 1000 (9th Cir. 1965).

clusion of the prosecution's case on the previous court day (Friday, January 24, 1964). It was originally based on various newspaper stories and radio or television broadcasts of January 27th and 28th, 1964, referring to a bombing of a witness in Chicago (Exs. MM1-MM10). This motion was denied, but the jury was admonished not to read any papers or watch any television or listen to any radio (R.T. pp. 1915-16.) The court at that time declined to collectively or individually interview the jurors.

Thereafter other newspaper stories appeared (Exs. MM11-15) on January 29th and 30th, 1964. The motion for a mistrial was renewed, and the trial judge vacated his previous denial of the motion for mistrial, (R.T. p. 1992) re-opened the matter, and thereupon did individually interview each of the twelve jurors and the one alternate. Six of them had heard, read or seen nothing. Three had read one newspaper story; two had heard one television reference; one had had "a short discussion in the jury room" (sic); and one had heard a conversation outside the courthouse. None thought they had been influenced or prejudiced by anything read, heard or seen. At worst, those that obtained any knowledge knew that defendant Marshall, also known as Caifano, had something of a bad reputation in Chicago, and had been charged with complicity in some crime and would ultimately stand trial there. The court denied the motion for mistrial.

The next day the defendants once again renewed their motion for a mistrial (R.T. p. 2192). The motion was again denied (R.T. p. 2221). Exhibits MM15A and MM17-2 covering further January 29th and 30th stories were introduced in evidence.

First let it be said that nowhere in the newspaper or television accounts is there any reference to a specific *conviction* of any defendant. This, we think, in view of the language used in certain cases, is important.

Secondly, some of the alleged error is trivial.[4] But the newspapers did report Marshall's (or Caifano's) arrest in Las Vegas for failure to register "as an ex-felon." There were references to "the underworld"; to a "Cosa Nostra swindle trial," and to "the syndicate." It was after these references in newspapers and on television that the trial judge interrogated the jury, as suggested in *United States v. Accardo,* 298 F.2d 133 (7th Cir. 1962).

The Chicago Tribune of January 29, 1964, printed the story that the injured man, Lewis Barbe, "named Marshall Caifano, crime syndicate terrorist, as the man who engineered the bombing attempt on his life." There was no proof any juror saw, or had the opportunity to see, or read or hear this story. It was not repeated in any Los Angeles news media story, so far as Exhibits MM1-MM20 disclose, except one—the January 29th edition of the Hollywood Citizen-News (Ex. MM17), where it appeared in a slightly different and more condensed form.

Appellants rely upon *Marshall v. United States,* 360 U.S. 310 (1959); *Michelson v. United States,* 335 U.S. 469, 475-6 (1948); *United States v. Kum Seng Seo,*

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[4]For example, appellants object to the newspaper's description of John Marshall as "Johnny Marshall, 52, formerly known as Marshall Caifano." (Appellant Marshall's Brf. p. 19.) Appellant Marshall was indicted in this proceeding as "John Marshall (also known as Marshall Caifano)." On arraignment, Marshall stated his true name was "as set forth in the indictment."

300 F.2d 623, 625 (3d Cir. 1962); *Holmes v. United States,* 284 F.2d 716, 718 (4th Cir. 1960).

In *Marshall, supra,* the Supreme Court quotes the precise newspaper story which "got before a substantial number of jurors" (360 U.S. at 311). Such an "exposure" was never established, factually, in this case. Both the Chicago Tribune and the Citizen-News stories came out *after* the interrogation of the jury by the district judge on January 29, 1964, and his detailed, precise and continuing instructions to the jury that they must read, hear or watch nothing connected with the Chicago bombing case. We must, and do, presume the court's instructions were followed. *Sheppard v. Maxwell,* 346 F.2d 707, 723 (6th Cir. 1965).

Of course, under the facts of the *Marshall* case, supra, the mere instruction by the court was held an insufficient cure. Any instruction can never be a certain cure, *under certain facts.* But as *Marshall* states (360 U.S. at 312), "The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. *Holt v. United States,* 218 U.S. 245, 251. Generalizations beyond that statement are not profitable, because each case must turn on its special facts."

We think one further fact in this case should be commented upon. Here, in one story, Caifano was referred to as an ex-felon who failed to register as such when he went to Nevada during the weekend of January 25th to 29th. Whether he went to Nevada or not, we do not know. Whether he was an ex-felon or not, we do not know. But if both be true, he brought the matter on himself, and cannot complain if he was arrested, and the placing of such a charge against him was re-

ported by news media. To hold that any defendant once a felon could thus require a mistrial of any pending trial at any time he thought advantageous to him, is carrying the protection of a defendant's alleged rights too far. It is for this reason, we think, that the Supreme Court has suggested each case must rest on its own factual bottom. But we need not weigh this factor in this case, because of the lack of any evidence that this particular news story came to the attention of any juror.

Thus we are faced with an inability, on the record before us, to ascertain precisely what, *if anything,* concerning defendant Marshall (nothing was said in any news story about Del Monico) any one or more juror read, heard or saw; other than a general reference to a bombing of and serious injury to a witness in Chicago to events connected with a Cosa Nostra-insurance racket-syndicate-investigation in that city.

We think it fair (when there can be no thought of the story coming through or from the prosecution) that the burden to show a defendant has been unfairly treated is on that defendant. *Beck v. Washington,* 369 U.S. 541, 558 (1962). Here that burden has not been met.

A sound discretion, to be judicially exercised, must still be permitted to exist in the trial courts. We think such was here exercised. Unlike *United States v. Accardo, supra,* the trial judge here did not refuse to properly admonish and instruct the jury concerning any newspaper stories. He endeavored to ascertain, by careful examination of each juror (each out of the presence of the others), the effect, if any, of anything read, heard or seen on those who had read, heard or seen

anything about the Chicago bombing, and whether there had been any discussion within the jury as to it, and if so, to what extent. This was what *Accardo* suggested he should do. Had the district judge in *Accardo* done as much, we can presume there would have been no reversal. It would be useless to require such a procedure of the trial judge, and then pay no attention to his conclusions, made in the exercise of that discretion we are required to, and do, assume he possesses.

The facts of this case do not bring it within the rule of *Holmes v. United States, supra,* where a court official communicated with the jury. Nor do the facts in this case resemble those in *Coppedge v. United States,* 272 F.2d 504, 507 (D.C. Cir. 1959). There "no individual inquiry was addressed to these persons as to the possible influence of the [newspaper] articles [which they had read] upon each of them. Only a general and very brief inquiry was made of the jury as a whole." (272 F.2d at 508.) Nor was there any admonition not to talk to other jurors, as there was here.

In *United States v. Kum Seng Seo, supra,* the nonadmissible newspaper clipping was actually taken to the jury room, and its factual recital relied upon by one or more jurors. And see *Holt v. United States,* 218 U.S. 245, 251 (1910), where Mr. Justice Holmes stated:

> "* * * If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day. without intimating that the judge did not go further than we should think desirable on general principles, *we do not see in the facts before us any conclusive ground for saying that his expressed belief that the trial was fair and that the prisoner has nothing to complain of is wrong.*" (Emphasis added.)

From what the trial judge said in the full record before us (R.T. pp. 2193-2211) he felt the jury would not be prejudiced by what they had heard or read or seen or discussed—that "the jury will not be prejudiced and that the defendants will not be jeopardized by reason of this information."

As we said in *Yates v. United States,* 225 F.2d 146 (9th Cir. 1955), reversed on other grounds, 354 U.S. 298 (1957): "The trial judge believed this jury could be trusted." It had received the individual interrogation, admonitions and instructions required. On well known principles relating to his better opportunity to observe and judge the intelligence, understanding and credibility of those persons he has personally interviewed, we will not, without substantial reason, substitute our own determination for that of the trial judge. We find no error.

V.

We turn to the alleged taint attached to the jury verdict arising from the "Special Police Badge" one juror possessed.

As worded by appellant Marshall, the question presented allegedly is:

> "[Is] a defendant . . . denied a fair and impartial jury and deprived of his right to exercise peremptory challenges when a juror *conceals the fact* that he *carries* a special police officer's badge[?]" (Emphasis added.)

This is not a fair hypothetical question because it does not fairly state the facts. No juror was asked if he carried any kind of badge. Can it be fairly stated a person concealed a fact when no question concern-

ing that fact was asked him? This is not an example of a prospective juror evading or concealing a fact, but of defense counsel failing to ask a question they now wish they had asked.

One juror, Mr. Keasey, was in the courtroom when the entire panel was asked on voir dire by the trial court:

> "Have any of you or are any of you now *employed* as a law enforcement or peace officer or police officer, or have you ever been, or has any member of your family ever been so employed?" (R.T. p. A53.) (Emphasis added.)

He remained silent. A motion for new trial was made upon the ground that had appellants known as much about Mr. Keasey before the verdict, as after, they would have peremptorily challenged him. (C.T. pp. 248, 311, 315, 319, 322.) This they had failed to do. (R.T. A108.)

There was a hearing on appellants' motion for new trial, and Mr. Keasey was called as a witness by and examined by appellants' counsel. He was then examined by government counsel, and by the trial judge (Supp. Tr. p. 23). Appellee has accurately summed up his testimony and the trial court's reaction to the charge of concealment of a material fact. We recite this summary in the margin and adopt it.[5]

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[5]"Mr. Keasey testified that he worked for the Pacific Telephone Company, and that he had previously been employed by the Glendale Parks and Recreation Department as a sports director, particularly with the badminton program. It was part of his job, insofar as it was possible, to keep undesirables out of the parks. Mr. Keasey had a badge, which he kept in his dresser drawer which said, 'Special Officer, Glendale Police Department'. It was the same kind of identifying badge that nearly all crossing guards and park attendants in

Thus there was not here a deliberate concealment on the part of a prospective juror of any fact, nor any attempt on Mr. Keasey's part to avoid or evade any question. Nor was any untruthful answer given by him. The facts here thus differ markedly from those in *Clark v. United States,* 289 U.S. 1 (1953), where the juror was "wilfully evasive and knowingly untrue." The

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Glendale have. He had been given the badge by a Lieutenant of the Traffic Bureau so that when he would be crossing through the parks and seeing how the activities were going, such as softball, volleyball, etc., he would have some identification of his position—like an arm patch. He had never been employed by the Glendale Police Department. He had no authority to arrest, and had never been given any official instructions by the Police Department other than that he was told, 'Don't get yourself in a spot that you can't—where you are going to get hurt. If you need help, call us and we'll take care of the situation.' He never worked on any case or in any activity where his badge was needed or used at the instructions of the Police Department. On New Year's Eve, in conjunction with the Parks Department, he has helped escort the City of Glendale float to the formation area for the Rose Parade in Pasadena.

"The trial court was satisfied that appellants were not prejudiced by Mr. Keasey's silence, in that his employment was not such as to require an affirmative response. The motions for new trial were denied.[4]

"Mr. Keasey's testimony makes very clear that he had never been employed as a law enforcement or peace officer, and that he never had the authority nor had he ever purported to act in the capacity of such a person. His job was supervising recreation activities and incident thereto he was charged by the Parks Department with seeing that the programs were conducted in an orderly fashion. The fact that he had been given the 'Special Officer's' badge did not confer any official status or duties nor did it constitute any sort of 'employment' within the meaning of the Court's inquiry. Mr. Keasey was employed by the Park Department and none other.

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[4]In denying appellants' motions for new trial, the trial court stated the following:

'Now, I think the only problem concerning Mr. Keasey is he has testified on the stand under oath and, I think, under circumstances which are most apt to bring about a truthful statement that he was never a police officer; that he

only question asked was as to the juror's *employment;* in failing to advise of his nonemployment, the silence did not "deceive or mislead the court," *Consolidated Gas & Equipment Co. of America v. Carver,* 257 F.2d 111 (10th Cir. 1958), nor did he dishonestly "conceal a material fact," *Carpenter v. United States,* 100 F. 2d 716, 717 (D.C. Cir. 1938).

Appellant urges that this court's opinion in *Cavness v. United States,* 187 F.2d 719 (9th Cir. 1951), "does not detract from appellants' argument here." We think it does, because it holds the failure of the juror in *Cavness* to disclose he was a reserve police officer does *not* disqualify him for cause. (There the reserve officer did not respond when the entire panel was asked as a whole if any were or had been reserve police officers.)

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has never been engaged in police activities or any activities under the direction or control of any police organization.

'If he made statements contrary to that over a few drinks in a social atmosphere, I think we are interested not so much in the fact that he may have made contrary statements as we are interested in what the facts are. And he has testified under oath here that he was never a police officer. I think we are entitled to believe him, and I do. I find that he was never a police officer; that he was employed by the City as a director of sports in connection with the Park Department; that he was given a special police officer's badge in order that he might more perfectly carry out the functions of the sports director in the case that he had ever needed some badge of authority. I assume that if he had a badge saying, "Authorized Sports Director" it might have been sufficient. But they didn't see fit to give him that kind of a badge, they gave him a special police officer's badge.

'And from his own testimony he has never participated in any police work of any kind for pay or otherwise. That being the case, I feel that this statement that he gave at the time of the *voir dire* examination is a true and correct one, that he did not lie, and that eliminates the discussion as to whether or not the defendants had been prejudiced by not having had the opportunity to use this peremptory.'"

(Appellee's Brf. pp. 75-8.) (References to the Clerk's Transcript omitted.)

If not disqualified for cause, he had no duty to voluntarily reveal his reserve status—merely to voluntarily bring to the court's attention any fact which *would* disqualify him for cause and to honestly answer all questions that might be propounded to him concerning any facts that might be the basis for a peremptory challenge. He was asked no questions on individual voir dire.

To grant the result here sought by appellants would result in utter chaos in every jury trial—for without counsel for appellants asking a single question on voir dire, a voluntary disclosure of hundreds of factual situations by each juror would be required, without the juror having any knowledge or indication of what factual situations he was required to relate.

We agree with the court in *State v. Simmons,* 368 P.2d 378, 384 (1962), that "where a person serves on a jury who, if not excused for cause, would certainly have been peremptorily challenged if certain questions on *voir dire had been answered truthfully,* it has been held to be an abuse of discretion not to grant a new trial." (Emphasis added.) Here, nothing but "truthful silence" existed; and we find no error.

VI.

We next come to two evidentiary points we consider of lesser importance.

1. The admission of evidence as to Ray Ryan's "subjective emotional feelings."

2. The admission of evidence from the prosecution witness of testimony it allegedly believed not to be the truth.

As to the first evidentiary error charged, no cases are cited by appellant Marshall, and appellant Del Monico does not specifically raise the point.

Extortion is defined in California by § 518 of the Penal Code; in Nevada by Title 16, §§ 205.315-25, Revised Statutes. Each requires force, or threat of force, or injury, to accomplish extortion. "Fear" is expressly referred to in the California Statute. A threat is the expression of an intention to inflict evil or injury on another. To ascertain if it produced fear, *i.e.*, if the threat were successful—may well have gone beyond the strict statutory requirements of Nevada. The government may have proved more than it had to—but we do not think such a conclusion is required. Under Nevada law, the act so done by the victim may be done against his will because of threats; and the presence of fear is proof that the threats were effective, and that because of such fear his volition was overcome—that threats produced fear that caused the victim's will to be overcome.

We think the colloquy between court and counsel after the testimony that Del Monico struck Ryan on the automobile ride to Palm Springs Airport pointed out the purpose and validity of the evidence. Was it a "playful tap" made in jest or a "purposeful poke" intended to produce fear?

We have approved the introduction of such evidence in *Carbo v. United States*, 314 F.2d 718, 740-1 (9th Cir. 1963), *cert. den.* 377 U.S. 953, *rehearing denied* 377 U.S. 1010 (1964), wherein we said:

> "To prove a substantive act of extortion it is essential to show the generation of fear in the victim. To prove a substantive act of attempted ex-

> tortion, it is necessary to prove an attempt to instill fear. To prove a conspiracy to extort it is necessary to show a plan to instill fear."

Cf. also: *Cole v. United States,* 327 F.2d 360 (9th Cir. 1964); *Nick v. United States,* 122 F.2d 660 (8th Cir.), *cert. den.* 314 U.S. 687, *rehearing denied,* 314 U.S. 715 (1941); *Bianchi v. United States,* 219 F.2d 182 (8th Cir.), *cert. den.* 349 U.S. 915, *rehearing denied,* 349 U.S. 969 (1955). We find no error.

Appellants' second evidentiary point arises through the government calling Nicholas Dandolas as a witness. After calling "Nick the Greek" to testify, the government argued to the jury that his testimony was untrue. This, say appellants, prevented them from having a fair trial.

Five cases are cited in support of this position. They are all cases where the government, *knowing the testimony was false,* introduced it before the jury or permitted it to go into evidence, and *asked or permitted the jury to believe it,* in order to procure a conviction. In *Mooney v. Holohan,* 294 U.S. 103, 110 (1935), "the sole basis of his [petitioner's] conviction was perjured testimony, which was knowingly used by the prosecuting authorities in order to obtain that conviction, and also that these authorities deliberately suppressed evidence which would have impeached and refuted" the false testimony. *Pyle v. Kansas,* 317 U.S. 213 (1942), stands for the same principle. In *Alcorta v. Texas,* 355 U.S. 28 (1957), the district attorney advised a witness not to volunteer any information about a fact which the witness had lied about, and denied, on the stand (adultery with the defendant's wife.) The prosecutor admit-

ted the advice had been so given to the witness. In *Napue v. Illinois,* 360 U.S. 264 (1959), the principal state witness, an accomplice, had been promised consideration in return for his testimony. The prosecutor knew this, but remained silent when the witness denied it on the stand. In *Brady v. Maryland,* 373 U.S. 83, 87 (1963), the prosecution in a murder trial knowingly withheld from defendants knowledge of the existence of a confession obtained from a companion tried separately, that he had actually fired the fatal shot. *Held:* defendant's sentence was subject to review in a new trial because of denial of due process. In *United States v. Wilkins,* 326 F.2d 135 (2d Cir. 1964), the prosecution suppressed evidence favorable to the defendant in a robbery case.

But Nicholas Dandolas was something more to this case than another witness called by the prosecution. He was an unindicted coconspirator, named in the indictment as such. The government, in order to escape any possible charge of failing to supply the jury with all possible evidence of the circumstances surrounding the crime charged, called Dandolas by reason of his involvement therein, or (perhaps) his alleged involvement therein. Here government counsel correctly states they "neither suppressed the truth nor offered prepared testimony as the truth"; nor did they fail to attack, both in other testimony and on argument, any of Dandolas' testimony they thought was untrue.

Prosecutors have a narrow line to walk in avoiding possible perjured testimony, and yet are required to present "all the material evidence" within their knowledge, irrespective of the source, even though there appears to be sound reason to doubt its accuracy. *Cf.*

Thomas v. United States, 343 F.2d 49 (9th Cir. (1965); *Orebo v. United States,* 393 F.2d 747 (9th Cir. 1961).

The prosecution has the best chance to stay within the prescribed narrow path by permitting the jury to hear

> "the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court, rather than by rejecting witnesses as incompetent." *Rosen v. United States,* 245 U.S. 467, 471 (1918).

Fairness is an element of due process, and we discern no element of unfairness in calling Dandolas as a witness, and then questioning certain parts of his testimony.

What was here done cannot be tortured into a prosecutor's scheme (as counsel for Del Monico would have us believe) "to prove the defendants guilty by producing a witness to testify falsely (for the defendants)." (Appellant Del Monico's Brf. p. 46.)

VII

Appellant Del Monico presents a further point: that the government attorney's "pointing up" the appellant's failure to take the stand was error.

We find no place in the record, nor has it been pointed out to us, where counsel for the government asked the jury to consider that neither defendant took the stand on his own behalf. This explains perhaps the use of the term "pointing up." The failure was "pointed up," urges counsel for Del Monico, because counsel for the government, in answering counsel for

defendant's argument "pointed to the witness Ryan," and argued *in effect* that defendants "had conceded the truth of Ryan's testimony of the conversations had with the defendants."

Although neither defendant took the stand, counsel for Del Monico proceeded in his argument to make admissions *on behalf of his client* (R.T. pp. 2425-6; 2440-1). These admissions were not restrictive in their nature. "We admit everything every witness said except Raymond Ryan." (R.T. pp. 2455; 2441; 2443.) In reply government counsel pointed out the defendants were required to rely on Ryan's testimony that the defendants were "collecting" for Dandola. "There is no one else that even testified on the subject." (R.T. pp. 2575-6.)

This says Del Monico, "points up" his failure to take the stand. Because it was preceded in argument by the prosecutor pointing out that Dandola had denied defendants were collecting for him and that neither counsel for defendants had cross-examined Dandola on the subject, we can assume that Mr. Sheridan, counsel for the government, was obviously referring to this question of authorization, if any, from Dandola to defendants to "collect" for Dandola. Counsel for codefendant Marshall so recognized it as comment on Dandola's testimony (R.T. p. 2580).

The cases relied upon by Del Monico in the main involve a direct specific comment on defendant's failure or refusal to take the stand. *Stewart v. United States,* 366 U.S. 1 (1961); *De Luna v. United States,* 308 F.2d 140 (5th Cir. 1962); *Leathers v. United States,* 250 F.2d 159 (9th Cir. 1957); *Langford v. United States,* 178 F.2d 48 (9th Cir. 1949); *Linden v. United States,* 296 Fed. 104 (3d Cir. 1924).

We are not quick to rely on a statement which merely, or perhaps incidentally, "points up" defendant's failure to take the stand, where no direct comment is made to that effect. In *Langford, supra,* we stated (178 F.2d at 55):

> "Except in those special cases where it appears that the accused himself is the only one who could possibly contradict the government's testimony, . . . the prosecutor may properly call attention to the fact that the testimony of the government witnesses has not been contradicted. . . ."

Interpreting the Supreme Court's holding in *Stewart v. United States, supra,* which precludes any comment or argument about a failure of a defendant to take the stand in "the light of reason," we conclude the language used was not "manifestly intended [to be] or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *United States v. Wright,* 309 F.2d 735, 738 (7th Cir. 1962).

Further, the court's instructions on the subject were clear, forceful and proper. (R.T. p. 2643.)

VIII

Finally, appellant Del Monico objects to the failure to give (1) defendant's requested instruction No. 8 (R.T. 266-7), and (2) certain requested definitions. Instruction No. 8 required a "close scrutiny" of testimony where the case stands or falls on it. The court gave other ample proper cautionary instructions. (R.T. pp. 2636-7). And we see no reason to define the words concerning which definition was refused. We find no merit in either objection.

The judgments of conviction are affirmed.

APPENDIX B.

Judgment.

United States Court of Appeals, for the Ninth Circuit.

John Marshall and Charles Del Monico, Appellants, vs. United States of America, Appellee, No. 19,383.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California Central Division.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgments of the said District Court in this Cause be, and hereby are each affirmed.

Filed and entered Jan. 27, 1966.

APPENDIX C.

Constitutional Provisions and Statutes Involved.

Fifth Amendment to the United States Constitution, which reads in part:

> "No person shall be held to answer for a(n) . . . infamous crime, unless on a presentment or indictment of a grand jury . . . nor be deprived of . . . liberty, . . . without due process of law; . . ."

Sixth Amendment to the United States Constitution, which provides, in part:

> "In all criminal prosecutions the accused shall enjoy the right to a . . . trial, by an impartial jury . . ."

Article I, Section 8(18) of the United States Constitution:

> "The Congress shall have Power . . .
>
> "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof."

Tenth Amendment to the United States Constitution:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."

18 U.S.C. 1952; 75 Stat. 498:

> "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
>
> "(1) Distribute the proceeds of any unlawful activity; or

"2) Commit any crime of violence to further any unlawful activity; or

"(3) Otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, . . .

"and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $1000 or imprisoned for not more than five years or both.

"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion or bribery in violation of the laws of the State in which committed or of the United States.

"(c) Invpstigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury."

18 U.S.C. 371 provides:

"If two or more persons conspire either to commit any offense against the United States, to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

APPENDIX D.

Excerpts From Jurors' Statements to the Trial Court on Examination as to Their Exposure to the Prejudicial Newspaper and Television Publicity.

Juror Tritz: That she read the headline in the Herald (RT 2008), that there was discussion in the jury room, someone saying "'some nice fellers,' or something like that." (RT 2010);

Juror Lewis: "I maybe should state that—that—when was it? In Monday's paper, Monday evening's paper I picked it up and started reading about this incident back in Chicago, and of course I got down half way through the article and discovered a name I recognized. I certainly didn't expect to run across this name when I started to read it," (RT 2018). "merely that this insurance man back there was blown out of his car. and it mentioned the name of Marshall Caifano as being one of the men charged with him in this case. And that's about all that I remember." (RT 2019). In answer to a question by the Court as to whether there had been any discussion in the jury room about the stores, (RT 2021): "Very little, and only to the extent that—and I think we all agreed that this should not enter our decision in this case, that regardless of what they might have done before or since or at any other time, that we are to judge them strictly on the basis of what is brought out in the courtroom . . . we did see it in the newspaper . . . Well, I am sure all the other members of the jury are aware of this incident back there . . ." (RT 2021).

Juror Service: "Well I was reading about the Chicago bombing. Now, I had no idea that it had any-

thing to—or any names in it, and I was—I was already into it before I realized—" (RT 2025), "well, I saw it on TV, I think it was, Sunday night, but all I saw was the picture of the man." (RT 2025-2026).

In answer to the Court's question as to whether there had been any discussion in the jury room: "well, there has been some but we have tried real hard to keep from—" (RT 2026); that there was "just a reference, I think" to the Chicago story (RT 2026); "I don't think anybody went into detail." (ibid.)

Juror Keasey: "Inadvertently, I believe it was the day before yesterday, or—not last evening, but Monday evening, I am not sure, about the bombing in Chicago, and then I heard Marshall's name, I got the heck out of the room real fast. But I did know this happened yes." (RT 2030). "Television, I think it was Monday evening. That was the first and only time I knew about it." (ibid.). "I saw the picture in the paper and I skipped it. I realized what it was . . . they mentioned the case was delayed in Chicago because of a defendant being detained in Los Angeles by the name of Caifano. I recognized this and I immediately left the room" (RT 2031).

Juror Owen: "I was listening to the news, I think it was Sunday night, and my mind wasn't on it, I was doing something else at the same time, until I heard the name 'Marshall' and then I had missed the story, I didn't know what it was about, actually." (RT 2034). "I have heard since—I don't recall it, but then I did connect up to the Chicago incident . . . I know that this automobile was bombed, and I know that Caifano's name was mentioned with it. I don't know in what respect. I know because I heard the name on tele-

vision and then later this discussion, then I realized that this is what it was connected up with. That's how much I know about it." (RT 2035).

Juror Cole: "I have heard it mentioned—in relation to the case, but I (RT 2039) went in no discussion on it whatever . . . it was mentioned yesterday that one of the defendants had been involved in a case that took place in Chicago and as soon as he finished here he had to go to Chicago. That's—and they said it comes under—it was another name in the paper, and one of the —someone on the jury said 'well, that doesn't pertain to the case at all and I am not reading the papers.' And they said, well, they heard it over the news before they could get it off, or something like that, and that was all." (RT 2040)

Juror McCallen: "Well, I would have to say that the other night I got—I got the story in the—Chicago—the pictures were there and all, and you were half way through the article before you knew that it concerned this case in any way. . . . I mentioned, 'my goodness, here is'—even mentioned the case in the article. This case, I mean." (RT 2043). In answer to the Court's statement (RT 2044) that he understood some mention was made in the jury room: "Well, just our—one of the defendants was—have to face trial in Chicago, and he is involved in this case, and what a mess, and just, you know, remarks that you would naturally make after reading anything like that which everybody read. They couldn't help it. . . . I don't think that would affect me at all. My mind was made up before this happened." (RT 2044).*

*Later, following the charge to the jury and before the jury retired, this juror was excused [RT 2713-2714].

Juror Stein: When asked by the Court as to whether she had been exposed to the Chicago story: "That wasn't talked about up in the jury room. I heard something about that, I did hear something about it. But that was when I was at my very worst; I had a temperature of 102 yesterday. I was pretty sick." (RT 2048) "Just conversation, with no details of any kind . . . said something about Marshall is going to have to stand trial." (RT 2049)

Juror Morrow: "If you are referring to what I think you are referring to, I didn't read about that at all. I happened to hear about some bombing, a bomb, or something in somebody's car, but I didn't read about it. I didn't listen to it . . . if you would like, I can explain a little further why I am sort of tying the two into it . . . because a long time ago I had heard about a Chicago Syndicate. The word 'syndicate' was mentioned in the evidence that I have heard so far, and that's why I thought you were relating the two in some way that way. But I don't know anything about it . . . when I was in the bus last night—it must have been in the bus when I went home last night, I heard some people discussing something about the man that was in the car, something about a bomb, and his hip was bad. But they were talking more about the condition of the man; and I didn't hear any more than just about that." (RT 2061)

APPENDIX E.

Defendant John Marshall's Requested Instruction No. 48.

You will note that Count 1 of the Indictment, the so-called conspiracy count, contains many elements. It charges the defendants with agreeing to travel in interstate commerce with intent to do one of three things as I have previously outlined. If the prosecution has not proved beyond a reasonable doubt that the defendant or defendants had that specific intent, you must find the defendant or defendants not guilty. Further, you may not find the defendants guilty if you do not find that each of the defendants agreed to travel in interstate commerce with the same intent. For example, if some of you find that the defendants agreed to travel in interstate commerce with intent to distribute the proceeds of extortion, while others of you find that the agreement was to travel with intent to commit a crime of violence to further extortion, while the rest of you find that the agreement was to travel in interstate commerce to promote extortion, you may not find the defendants or either of them guilty. In other words, you all must be unanimous, before there can be any finding of guilt, as to each of the elements of the charge as I have previously set it out.

To illustrate further. If some of you find that the defendants agreed to travel in interstate commerce with intent to promote extortion, but the rest of you find that the intent was to manage extortion, you may not find the defendants or either of them guilty.

The same is true as to the rest of the elements of the charge. In other words, you may not find the de-

fendants or either of them guilty, and you must find them not guilty, if there is any disagreement among you as to what the intent of the defendants was, or as to which acts, if any, the defendants performed or agreed to perform.

Given .....
Refused .....
Given as Modified .....

Judge.

Defendant John Marshall's Requested Instruction No. 50.

The essential elements the prosecution must prove beyond a reasonable doubt under Count 3 of the Indictment are that on or about May 1, 1963, the defendants Marshall and Del Monico travelled in interstate commerce from Palm Springs, California to Las Vegas, Nevada

1. with intent to commit a crime of violence to further extortion in violation of Nevada law, or

2. with intent to promote, manage, establish, carry on or facilitate the promotion, management, or carrying on of extortion in violation of Nevada law and

3. Thereafter the defendants performed and attempted to perform,

a. acts to commit a crime of violence to further extortion in violation of Nevada law, or

b. acts to promote, manage, establish, carry on or facilitate the promotion, management, establishment or carrying on of extortion in violation of Nevada law.

You will note that in this count the defendants are not charged with travelling with any intent to facilitate the establishment of extortion.

Here, as in Counts 1 and 2, you must find the defendants and each of them not guilty if there is not unanimity among you as to each of the elements charged. And, of course, as to each of the elements charged the prosecution's proof must be beyond a reasonable doubt.

Given .....
Refused .....
Given as Modified .....

Judge.